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Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-60–08 OF 2012 (W)

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RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, ZALEHA ZAHARI AND ZAINUN ALI FCJJ

27 JUNE 2013

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Civil Procedure — Striking out — Application for — Judgment in default of appearance — Appeal — Application to set aside judgment dismissed — Whether defendant could apply to strike out suit by relying on fresh evidence — Locus standi — Allegations that judgment in default obtained based on misrepresentation of fact and by fraud — Whether application should be allowed

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The appellant's aircraft's ('Cessna') insurance cover was handled by the respondent. While conducting a test on Cessna, the brakes malfunctioned and it crashed. The appellant requested the respondent to process the insurance claim but the respondent informed the appellant that the insurers had repudiated liability over the accident. The appellant proceeded to commence the present suit against the respondent in the High Court. When the respondent failed to answer the claim, the appellant entered judgment in default of appearance against the respondent. The respondent applied to set aside the default judgment ('encl 6') but the application was dismissed. The respondent then appealed to the Court of Appeal but the default judgment was maintained and referred back to the High Court for assessment of damages. When the matter was fixed for hearing on the assessment of damages, the respondent filed an application ('encl 29') to strike out the suit as it was averred that the appellant lacked locus standi and had no insurable interest in Cessna. The High Court allowed the respondent's application and struck out the appellant's suit. The appellant then appealed to the Court of Appeal but the appeal was dismissed. Hence, the appellant brought this appeal against that decision. In the present appeal, it was submitted that even if there were fresh evidence or fraud or any complaint causing a defect in the writ or cause of action, the respondent could not apply to the High Court in the same proceeding after a regular default judgment had been confirmed and upheld by the Court of Appeal and the Federal Court, to set aside that judgment and strike out the entire writ summarily vide a summons in chambers application. The appellant contended that the correct procedure would be for the respondent to file a fresh suit to impeach the earlier judgment. The fresh suit would then give an opportunity to the respondent to adduce the necessary evidence to prove the allegation that it had no knowledge that the Cessna's registration was in the name of Sprint Air Inc and to prove that the appellant

had committed fraud on the court by its misrepresentations of facts. In a fresh suit, the appellant would then be availed the opportunity to defend itself in open court in the face of such allegation of fraud. It was further submitted that a matter having gone up to the apex court must be given credence and must not be set aside or struck out subsequently by a High Court, in a summary manner as had happened here. Further, the High Court was already functus officio after it allowed the judgment in default and could not now act to strike out the writ.

Held, allowing the appeal with costs and setting aside the order made by the courts below on encl 29:

(1) The very filing of encl 29 was inherently defective and unknown under the Rules of the High Court 1980, and should have been summarily dismissed by the High Court. The application of the court's summary power to strike out a pleading under O 18 r 19 of the Rules of Court 2012. Although the power to strike out was a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case' could a pleading be struck out. In exercising it, and especially under r 19(1)(a), the court must have regard to the quality of an all the circumstances surrounding the plea (see para 42).

(2) Having considered the antecedents to encl 29, the application for the admission of fresh evidence was misguided. If the affidavits of both parties had been carefully considered, it would have been clear that the so-called fresh evidence was not new and readily available with a little earnest effort by the respondent. The court made a passing observation on this issue only because it arose from encl 29 and became the basis for the respondent's contention on lack of standing and fraud of the appellant (see para 43).

(3) Once a regularly obtained order or judgment had been perfected, the court was functus officio. The matter, as decided vide encl 6, was thus res judicata and could not be re-litigated. The order made under encl 6 was appealed and affirmed right up to the Federal Court. It could not now be revisited or re-asserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did (see para 44).

(4) The re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of res judicata. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine (see para 44).

[Bahasa Malaysia summary

Perlindungan insurans kapal terbang perayu ('Cessna') telah dikendalikan oleh responden. Semasa menjalankan ujian ke atas Cessna, breknya tidak berfungsi dan ia telah terhempas. Perayu memohon responden untuk memproses tuntutan insurans tetapi responden memberitahu perayu bahawa syarikat insurans menolak liabiliti ke atas kemalangan itu. Perayu seterusnya memulakan guaman ini terhadap responden di Mahkamah Tinggi. Apabila responden gagal untuk menjawab tuntutan itu, perayu memasuki penghakiman ingkar kehadiran terhadap responden. Responden memohon untuk mengetepikan penghakiman ingkar ('lampiran 6') tetapi permohonan itu ditolak. Responden kemudian merayu kepada Mahkamah Rayuan tetapi penghakiman ingkar dikekalkan dan dirujuk balik kepada Mahkamah Tinggi untuk penaksiran ganti rugi. Apabila perkara itu ditetapkan untuk perbicaraan berhubung penaksiran ganti rugi, responden telah memfailkan permohonan ('lampiran 29') untuk membatalkan guaman itu kerana ia menegaskan bahawa perayu tiada *locus standi* dan tiada kepentingan insurans dalam Cessna. Mahkamah Tinggi membenarkan permohonan responden dan membatalkan guaman perayu. Perayu kemudian merayu kepada Mahkamah Rayuan tetapi rayuan telah ditolak. Justeru, perayu membuat rayuan ini terhadap keputusan tersebut. Dalam rayuan ini, adalah dihujah bahawa meskipun terdapat keterangan baru atau fraud atau apa-apa aduan yang menyebabkan kecacatan dalam writ atau kausa tindakan, responden tidak boleh memohon kepada Mahkamah Tinggi dalam prosiding sama selepas penghakiman ingkar biasa disahkan dan dikekalkan oleh Mahkamah Rayuan dan Mahkamah Persekutuan, untuk mengetepikan penghakiman tersebut dan membatalkan secara terus keseluruhan writ melalui permohonan saman dalam kamar. Perayu berhujah bahawa prosedur betul adalah untuk responden memfailkan guaman baru untuk mencabar penghakiman terdahulu. Guaman baru itu akan memberi peluang kepada responden untuk mengemukakan keterangan yang perlu untuk membuktikan dakwaan bahawa ia tiada pengetahuan bahawa pendaftaran Cessna adalah atas nama Sprint Air Inc dan untuk membuktikan bahawa perayu telah melakukan fraud ke atas mahkamah melalui gambarannya yang salah berhubung fakta. Dalam guaman baru, perayu tidak dibenarkan menggunakan peluang untuk membela dirinya di mahkamah terbuka terhadap dakwaan fraud tersebut. Selanjutnya ia berhujah bahawa suatu perkara yang telah dihadapkan ke mahkamah tertinggi perlu diberikan kebenaran dan tidak patut diketepikan atau dibatalkan berikutan itu oleh Mahkamah Tinggi, secara terus sebagaimana yang berlaku di sini. Selanjutnya, Mahkamah Tinggi telah pun *functus officio* selepas ia membenarkan penghakiman ingkar itu dan sekarang tidak boleh membatalkan writ itu.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan perintah mahkamah terdahulu untuk lampiran 29:

(1) Pemfailan lampiran 29 telah sedia ada cacat dan tidak diketahui di bawah

Kaedah-Kaedah Mahkamah Tinggi 1980, dan sepatutnya ditolak terus oleh Mahkamah Tinggi. Permohonan kuasa terus mahkamah untuk membatalkan pliding adalah di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012. Walaupun kuasa untuk membatalkan adalah budi bicara yang luas, ia patut digunakan dengan berhati-hati dan hanya apabila ambang keperluan 'an obvious and unsustainable case' maka pliding boleh dibatalkan. Dalam menggunakannya, dan terutamanya di bawah k 19(1)(a), mahkamah perlu menitikberatkan kualiti kesemua keadaan sekeliling pli itu (lihat perenggan 42).

(2) Setelah mengambil kira keadaan sebelum lampiran 29, permohonan untuk kemasukan keterangan baru adalah salah. Jika afidavit-afidavit kedua-dua pihak telah diambil kira dengan teliti, adalah jelas bahawa keterangan baru itu tidaklah baru dan memang telah sedia ada dengan usaha lebih responden. Mahkamah telah membuat pemerhatian sambil lalu berhubung isu ini hanya kerana ia wujud daripada lampiran 29 dan menjadi asas hujah responden berhubung fraud oleh perayu dan yang tiada kedudukan (lihat perenggan 43).

(3) Setelah perintah atau penghakiman yang sering diperoleh telah menjadi sempurna, mahkamah adalah functus offio. Perkara itu, sebagaimana diputuskan melalui lampiran 6, dengan itu menjadi res judicata dan tidak boleh melalui litigasi semula. Perintah yang dibuat di bawah lampiran 6 telah dirayu dan disahkan sehingga ke Mahkamah Persekutuan. Ia tidak boleh kini disemak semula atau ditaksir semula di bawah apa-apa samaran dalam prosiding seterusnya. Isu-isu yang dibangkitkan oleh responden dalam lampiran 29 boleh dikemukakan semasa proses rayuan. Undang-undang tidak membenarkan responden melakukan sesuatu dua kali dan dalam cara yang dilakukannya (lihat perenggan 44).

(4) Litigasi semula untuk perkara yang sering dan betul diputuskan sebagaimana ditentukan oleh mahkamah adalah dilarang oleh doktrin res judicata. Proses kehakiman terletak pada dua tunggak iaitu kepastian dan kemuktamadan. Perintah atau penghakiman muktamad dengan itu patut dilindungi oleh doktrin ini (lihat perenggan 44).]

Notes

For cases on application for, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7984–7991.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)

A *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Jonesco v Beard [1930] AC 298, HL (refd)
Ladd v Marshall [1954] 1 WLR 1489, CA (refd)
B *Lembaga Kumpulan Wang Simpanan Pekerja v Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 MLJ 65; [2000] 2 AMR 2119, FC (refd)
Ling Kuok Teck & Anor v Tseng Choon Chin @ Tay Bak Hui & 5 Ors [1995] MLJU 329; [1995] 3 CLJ 889, HC (refd)
C *Price v Stone* [1964] VR 106, SC (refd)
Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd, BSN Commercial Bank Malaysia Bhd & Ors, (Interveners) [2000] 3 MLJ 201; [2002] 3 CLJ 16, CA (refd)
Standard Chartered Bank v KTS Sdn Bhd [2006] 4 MLJ 617; [2006] 4 CLJ 79,
D FC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479, CA (refd)

Legislation referred to

E Insurance Act 1996 s 2
Rules of Court 2012 O 18 r 19, 19(1)(a)
Rules of the High Court 1980 O 18 r 19(1), (1)(a), (d), O 42 r 13, O 56 r 3A

Appeal from: Appeal No W-02 (1M)-2690 of 2011 (Court of Appeal,
F Putrajaya)

K Jeyaraj (Ahmad Fadhli bin Salleh with him) (K Jeyaraj Fadhli Sin) for the appellant.
Murali Menon (Noradilah with him) (Jaffar & Menon) for the respondent.

G **Abdull Hamid Embong FCJ (delivering judgment of the court):**

[1] This case has an unusual history, as narrated by both counsel in their respective written submissions. Serac Asia, the plaintiff in the High Court (now
H the appellant) issued a writ of summons against the defendant, Sepakat (now the respondent), claiming for damages arising from the alleged negligence of the respondent under an insurance arrangement. The respondent failed to enter an appearance to that writ resulting in the appellant obtaining a judgment in default on the suit.

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[2] The respondent then filed on application to set aside the default judgment on 28 April 2006 (encl 6 in the High Court). This was dismissed by the deputy registrar on 22 June 2006, and later on appeal, by the judge on 10 October 2006.

[3] The respondent then appealed to the Court of Appeal which on 6 April 2010, maintained the default judgment in respect of liability and referred the matter back to the High Court for assessment of damages.

[4] The respondent's application for leave to appeal was dismissed on 18 August 2010 by the Federal Court.

[5] When the matter was fixed for hearing on the assessment of damages, the respondent filed an application (encl 29) to strike out the suit based on fraud and lack of locus standi of the appellant and to adduce fresh evidence to prove the basis of the striking out application. Enclosure 29, it must be noted, is not a fresh action but a summons in chambers filed to strike out a regularly obtained judgment in default. In other words, it was an application to strike out a writ filed subsequent to a judgment. Enclosure 29 is the subject matter of the appeal now before us.

[6] On 14 October 2011 the High Court allowed the respondent's application vide encl 29, resulting in the striking out of the appellant's statement of claim and writ. The effect of that decision was to nullify the previous order of the High Court in allowing for a judgment in default, which had been affirmed right up to the Federal Court.

[7] The appellant appealed to the Court of Appeal. Its appeal was dismissed on 8 March 2012.

[8] The appellant subsequently succeeded in applying for leave from the Federal Court which, on 7 August 2012, allowed the following five questions of law to be examined viz:

Q1: Can a suit wherein a judgment (in respect to liability) has been held valid by the Court of Appeal and Federal Court be subsequently struck out summarily by the High Court? Isn't the court functus officio in relation to a judgment which has been entered in the same suit?

Q2: Can a High Court impeach a judgment based on an allegation of fraud in the same proceedings in an application in chambers vide affidavit evidence?

Q3: Whether a party seeking to impeach a judgment based on fraud must file a fresh action and prove the alleged fraud and the burden of proof required?

Q4: Does an assured have a cause of action against their insurance broker in contract and tort for professional negligence and breach of duty of care in arranging the insurance needs of the assured for an aircraft to be purchased by the assured?

A Q5: Does a question of insurable interest arise in a claim by the assured against the insurance brokers based on negligence or as opposed to a claim by the registered owner of the aircraft against the final insurers?

[9] It was common ground that:

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(a) there is no dispute that the respondent was the insurance broker of the appellant;

(b) the appellant knew of the risks covered and paid the premium;

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(c) there is no dispute that the Cessna aircraft is not yet repaired; and

(d) there is no dispute that the insurance policy and the cover note were extended under the appellant's name.

D **[10]** The background facts which formed the basis of the appellant's claim are these:

(a) the appellant owned an aircraft known as Beach Baron registration No 9M-JJG, of which the insurance cover was handled by the respondent as insurance brokers since the year 2003. In July 2004, the appellant informed the respondent that it was intending to purchase another aircraft, a Cessna 421B registration No N700BC from the USA. As an insurance broker, the respondent recommended that the insurance cover for the Cessna aircraft be done by way of an endorsement on the Baron aircraft insurance policy. Pursuant thereto, the respondent caused to be issued an insurance certificate for the Cessna and the appellant paid the additional premium of RM46,589.34 to the respondent;

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(b) during the ferry flight of the Cessna from the USA to Malaysia, while it was at the Le Mans Airport in France on the 28 February 2005, when the appellant was doing a test on the Cessna, the brakes malfunctioned causing the Cessna to crash into the hangar doors and another aircraft. Following that accident, the appellant had requested the respondent to process the insurance claim in relation to the damages suffered arising from the accident involving the Cessna but the respondent failed to do so and later informed the appellant that the insurers had repudiated liability over the accident;

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(c) The appellant then gave to the respondent a quotation for repairing the damage caused by the accident together with a notice that if the respondent failed to attend to the repairs, the appellant would be at liberty to do the repairs on the Cessna and that all expenses and damages would be claimed from the respondent. The respondent failed to respond and thus the appellant claimed for loss and damages arising from the accident involving the Cessna;

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(d) in its statement of claim, the appellant pleaded that it had depended upon the professional expertise and the representations of the respondent as insurance brokers for the handling of the insurance requirements of the Cessna and holds the respondent responsible in tort, to ensure that the Cessna is properly and sufficiently insured at the material time. Specific particulars of negligence of the respondent as insurance brokers were pleaded; and

(e) the appellant vide encl 6, subsequently obtained a judgment in default when the respondent failed to enter an appearance to answer the claim.

[11] The basis for the respondent's striking out application in encl 29 was that the appellant had committed fraud in not revealing to the court that the Cessna aircraft was actually registered in the name of another company ie Sprint Air Inc, and not in the name of the appellant.

[12] As a consequence, it was averred that the appellant could not maintain its suit since it lacked locus standi and had no insurable interest in the Cessna.

[13] Before us, the appellant submitted that even if there were fresh evidence or fraud or any complaint causing a defect in the writ or cause of action, the respondent cannot apply to the High Court in the same proceeding after a regular default judgment had been confirmed and upheld by the Court of Appeal and the Federal Court, to set aside that judgment and strike out the entire writ summarily vide a summons in chambers application.

[14] The appellant contended that the correct procedure would be for the respondent to file a fresh suit to impeach the earlier judgment. The fresh suit would then give an opportunity to the respondent to adduce the necessary evidence to prove the allegation that it had no knowledge that the Cessna's registration was in the name of Sprint Air Inc. and to prove that the appellant had committed fraud on the court by its misrepresentations of facts. In a fresh suit, the appellant would then be availed the opportunity to defend itself in open court in the face of such allegation of fraud.

[15] It was submitted further that a matter having gone up to the apex court must be given credence and must not be set aside or struck out subsequently by a High Court, in a summary manner as happened here. Further, the High Court was already functus officio after it allowed the judgment in default. Thus it cannot now act to strike out the writ.

[16] In short, the appellant's complaint was in respect of the law and the correct procedure with regard to impeaching a regularly obtained judgment.

[17] Learned counsel for the respondent on the other hand contended that an action or claim can always be struck out when a cause of action does not exist in the first place and the High Court is not unjustified in dismissing an action proven to be scandalous, frivolous and vexatious or an abuse of its process.

[18] As regards the functus officio point, it was submitted that the application in encl 29 should be distinguished from the former application (encl 6) to set aside the default judgment, dated 28 April 2006.

[19] It was argued that the issue of the locus standi of the appellant by reason of its fraud in not disclosing a material fact viz that they are not the owner of the Cessna aircraft, was not a matter before the court during the hearing of encl 6.

[20] The first three questions thus can be discussed together as they are related. In giving our opinion, we will simultaneously answer the questions posed without the need to address them individually with the usual yes or no answers. But first, let us consider further the respective arguments.

THE OPPOSING CONTENTIONS

[21] It was the respondent's contention that the court in deciding encl 29 was not caught by the doctrines of functus officio and res judicata. Learned counsel for the respondent submitted that the door is not shut for the court to rehear the matter if special circumstances exist, as evinced by the following evidence, namely:

(a) the appellant's false pleading;

(b) the unconscionable conduct of the appellant by its failure to disclose material facts; and

(c) the challenge to the appellant's locus standi which will result in the dismissal of its suit, in limine.

[22] It was argued that in its encl 29 application it had raised a new issue ie that of the appellant's lack of locus standi by reason of fraud and non-disclosure of a material fact that the appellant were not the owners of the Cessna aircraft.

[23] Reliance was placed on the following holdings of the Court of Appeal in the case of *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd, BSN Commercial Bank Malaysia Bhd & Ors, (Interveners)* [2000] 3 MLJ 201; [2002] 3 CLJ 16, to contend that the court, where it acted under special circumstances, is not functus officio, and that under its inherent jurisdiction the High Court is seised with powers to set aside or amend even a final order. The Court of Appeal in that case held, inter alia, that:

(3) The extent of the court's inherent jurisdiction was extended by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* to allow the court unlimited jurisdiction to set aside orders: (i) where the order contravenes a substantive statutory prohibition rendering it defective on grounds of illegality of lack of jurisdiction; and (ii) where in exceptional cases, the justice of the case requires the court to intervene and correct a serious defect in the order.

(4) Under the aforesaid circumstances, a court is seised of jurisdiction to set aside an earlier order ex debito justitiae, without a need to appeal or file a fresh suit. This can be done in the same proceedings and before the same judge or another judge of concurrent jurisdiction.

(7) The justice of the case therefore entitled the interveners to apply to set aside the 1993 order in the same proceedings, and the High Court was not 'functus officio' but could hear an determine the application under its inherent jurisdiction.

[24] The respondent also argued that in the case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, the Federal Court had held that apart from a situation where an earlier order contravened a substantive statutory prohibition rendering that order defective for illegality, there is in exceptional cases, a situation 'where the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside' (see *Selvam Holdings* at p 24 of the report). In such a situation which attracts the *ex debito justitiae* principle, it has been held that 'there is no need to adopt the appeal procedure nor file a fresh suit to set aside a defective order'. It can be done in the same proceedings under which the impeached order was granted.

[25] The appellant's conversely argued that a perfected judgment cannot be summarily struck out in the same action by way of a summons in chambers as was done for encl 29 here. A fresh suit needs to be filed to impeach the order, even for an allegation based on fraud. The principles of res judicata and functus officio must apply. It was strongly argued by learned counsel that the court may exercise its inherent power to set aside a perfected order only in special circumstances limited to only one situation, namely, where the order was made in contravention of a statute. In support, this passage from *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479, was cited to impress upon us that even in *Badiaddin* itself, the final order was set aside, *ex debito justitiae*, for being in contravention of statute. That passage reads:

It is of importance to note that *Badiaddin* was a case in which the plaintiff brought a fresh action to rid himself of a final order made in contravention of the Malay Reservation Enactment (FMS Cap 142). It was therefore an exceptional case, as the judgment of the Federal Court in that case make plain. We would observe that on its fact, the present appeal has none of the features that were present in Badiaddin's case. At the risk of repetition, we say that this is not a case where an order had been made in defiance of a substantive statutory provision.

A FINDINGS OF THE COURT OF APPEAL

[26] It was thus submitted that the Court of Appeal in this case had erred in deciding that the plea of res judicata does not apply because of the 'existence of special circumstances'. The Court of Appeal here held that the respondent should be allowed to re-litigate this matter because it is a 'special case' due to the existence of fresh evidence. The Court of Appeal was satisfied that the evidence put forth by the respondent, as we earlier mentioned, formed a good basis for there to exist special circumstances so as not to shut the court's door to allow for the re-adjudication of the matter. The Court of Appeal had also found that the issue of locus standi of the appellant was not raised before by reason of the fraud by the appellant in not disclosing a material fact, ie that it was not the owner of the Cessna aircraft. The matter before it was thus not caught by the res judicata principle (*Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 followed). The Court of Appeal in concluding that this was a 'special case' for which res judicata is not applicable also relied on this passage from *Henderson v Henderson* (1843) 3 Hare 100, stating:

> In trying this question, I believe I state the rule of the court correctly when i say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable, might have brought forward at the time.

[27] The Court of Appeal after a perusal of the facts from the supporting affidavits of the respondent, concluded that since the appellant lacked locus standi to commence this action, the respondent was therefore justified in its application to strike out the pleadings on the ground of no reasonable cause of action and an abuse of the court's process under O 18 r 19(1) of the RHC 1980. The Court of Appeal also found that the appellant had been guilty of committing fraud on the court.

[28] The reasons for the Court of Appeal's findings are as stated in these passages which we now reproduce.

On locus standi, the Court of Appeal said:

[30] Since the plaintiff is not the registered owner of the Cessna aircraft, it has no locus standi to commence this suit against the defendant. Likewise the judgment in default should have been set aside and the whole action should be struck out for want of locus standi on the part of the plaintiff to initiate this proceeding.

[31] The obvious effect of locus standi is to exclude the plaintiff from having access to the courts. The locus standi rule is a technique of exclusion to exclude the plaintiff from gaining access to the courts. The question of standing goes to the jurisdiction of the court. In *Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 (SC) Salleh Abas LP had this to say about locus standi at p 20 of the report:

> Every legal system has a built-in mechanism to protect its judicial process from abuse by busy-bodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as locus standi.

[33] In short, the present plaintiff is the wrong litigant. The right litigant is Sprint Air Inc. The present plaintiff lacked standing to institute this claim against the defendant.

[34] The failure on the part of the plaintiff in disclosing the material fact pertaining to the ownership of the Cessna aircraft and using the court as a springboard to pursue its non bona fide claim amounted to an abuse of the process of the court. The court has the inherent jurisdiction to prevent an abuse of its process (*Raja Zainal Abidin bin Raja Haji Takchik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16).

And, on the fraud point, it ruled that:

[36] … Here, it is plain and obvious that the judgment in default was obtained by the plaintiff based on a misrepresentation of fact and by fraud and that would entitle the defendant to set aside the judgment in default.

[37] By not revealing and disclosing the material fact that the Cessna aircraft was not registered in the plaintiff's name, and by not disclosing the relevant documents to show the legal ownership of the Cessna aircraft, the plaintiff had committed fraud towards this court.

[38] It is germane to mention that the crucial issue of the day revolved on the question of whether a judgment obtained by fraud may be treated as a nullity and may be impeached, set aside or rescinded. And flowing from it would be an equally crucial issue to decide and that would be whether the judgment in default would be rescinded on the ground of discovery of new evidence? The answers to these two questions are in the positive;

[29] And in conclusion, the Court of Appeal said this:

The fresh evidence questioned the locus standi of the plaintiff to institute this action and it centred on the legal ownership of the Cessna aircraft which is the subject matter of this suit. It showed that the Cessna aircraft is registered under the name of

Sprint Air Inc and the defendant only came to know of this fact after the bundle of documents for the assessment of damages was forwarded to the defendant on 20 May 2011. In our judgment, the plaintiff has no insurable interest and that interest is vested in Sprint Air Inc. And the damages were also suffered by Sprint Air Inc and not the plaintiff. The defendant is also not the tortfeasor to Sprint Air Inc. In our judgment, the defect to the plaintiff's writ of summons and the statement of claim was so fundamental that it ought to be struck out fortwith.

[30] Having perused the judgment of the Court of Appeal, it seems to us, with respect, that only the evidence as found in the supporting affidavit of the respondent was considered by the Court of Appeal (the Court of Appeal never alluded to the opposing affidavit stating that the appellant never claimed that the Cessna aircraft was registered in its name). It was also a disputed fact that the respondent knew right from the outset that the Cessna aircraft was registered in the name of another company ie Sprint Air Inc. The appellant also averred that there was no justification to allow for the admission of fresh evidence as applied for by the respondent vide its encl 29. In short it was the appellant's contention that the *Ladd v Marshall* [1954] 1 WLR 1489, conditions were not met to allow for the admission of those so-called fresh evidence, since those evidence were already available or could be obtained with a little exercise of diligence by the respondent.

OUR FINDINGS

[31] It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is thus only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction, (see *Badiaddin*'s case).

[32] The Court of Appeal in *Selvam Holding* said that besides the situation above, *Badiaddin* seemingly had 'extended the scope and extent of the inherent and discretionary jurisdiction of a court' to set aside an order 'where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside'.

[33] We have carefully re-examined *Badiaddin* and could not find anywhere in its ratio to say that the court's inherent jurisdiction has an extended scope to correct an earlier regular judgment or order in exceptional circumstances other than where the judgment had been granted in contravention of a statute.

[34] The dicta of all the three learned judges can be seen from the headnotes of the report. What is obvious is the unanimity of their Lordships' opinions on when the inherent jurisdiction of the court can be invoked in striking out a previous perfected judgment or order.

per Azmi FCJ:

> The Court of Appeal, in allowing the respondent's appeal, had failed to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside the illegal attempt by the respondent to subvert and effectively reverse the original, final and perfectly legitimate order of the High Court, as a special exception to the doctrine governing the finality of court orders, notwithstanding the absence of any appeal. The learned judges had failed to direct their minds to the fundamental issue of whether the appellants' application came within the category of cases that attracted *ex debito justitiae*. The second order for sale of the land, which had the effect of an attachment in execution of a judgment, was null and void being in violation of the prohibition imposed by s 13 of the Enactment. Thus, that order being in violation of a statutory prohibition, it followed that the High Court should have the inherent jurisdiction to set aside the second illegal order on the basis of the *ex debito justitiae principle*.

per Peh Swee Chin FCJ:

> When a judgment in the High Court has been perfected, a party to the judgment generally, and subject to the same passage or any written law, and par from any appeal, cannot re-open the matter finalised in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank v Sahari Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation. It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first.

per Gopal Sri Ram JCA:

> As a general rule orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. So long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is entirely open to the court upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear that in the light of the principles established, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders

made in breach of written law. The ends of justice will not be met if such a power does not exist; and the procedural branch of the broad and flexible doctrine of estoppels known as res judicata finds no place in such a circumstance. Neither has the *functus officio* theory, which upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case.

[35] We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that *Badiaddin* to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. This established rule was explained in *Tenaga Nasional* which we had earlier adverted to. In our view, that part of the holding of the Court of Appeal in *Selvam Holdings* should not be interpreted as giving the courts a broad power to set aside a previous perfected orders under the guise of 'exceptional cases'. We think that the *Badiaddin*'s phrase 'to intervene and correct a serious defect in the order' should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, *ex debito justitiae* and without the need for file a fresh suit.

[36] As regards the appellant's submission on the court being *functus officio* and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 which we think has settledthese issues. The headnotes from the report in that case, which need no further explanation, or expansion, is now reproduced as our answer to those related questions:

In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed. Held:

(1) the learned judge was *functus officio*;

(2) the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original

hearing is forthcoming, a fresh action will lie to impeach the original judgment; (4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud.

[37] Although both the courts below had referred to the cases of *Ling Kuok Teck & Anor v Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] MLJU 329; [1995] 3 CLJ 889 and the *Hock Hua Bank Bhd*, which cases involved applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents, both the courts unfortunately missed to observe that in both cases fresh actions were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a '*fresh action* will lie to impeach the original judgment', and that the court had 'no power under any application *in the same action* to alter, vary or set aside a judgment regularly obtained. (Emphasis added.)

[38] Fraud on the court is obviously a serious allegation. It requires that higher standard of proof, one of beyond a reasonable doubt. In *Jonesco v Beard* [1930] AC 298 (HL), Lord Buckmaster observed that 'fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment'. The qualifying phrase 'if clearly proved' to us governs the manner on how fraud should be proved. In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321, it was held that a judgment may be impeached only for a 'deliberate fraud practiced upon the court' and that it is 'insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence' (see the Australian case of *Price v Stone* [1964] VR 106). It has been otherwise described as 'cheating to get an advantage'. Thus, to us, there is a need for a fresh action to adjudicate the issue.

[39] The courts below found fraud based on the allegation that there had been a misrepresentation of fact by the appellant in its suit. But, as stated earlier, this so called misrepresentation or suppression of evidence viz as to the ownership of the Cessna aircraft is a disputed issue. And it requires a viva voce inquiry rather than determination merely by way of affidavit evidence. That would be the only safe and proper procedure to determine such a serious allegation which in this case was fervently disputed. The appellant had adduced opposing evidence to show that the respondent knew from inception that the Cessna aircraft was registered in the name of Sprint Air Inc. The respondent too should have known from the registration number of that aircraft ie N 700 BC, with the prefix letter 'N' is an American registered aircraft, as contrasted to one registered in Malaysia which would bear the initial mark of '9M' in accordance

to article 20 of the Convention on International Civil Aviation 1944. It was also contended by the appellant that a simple search via the internet on the FAA website by clicking the Cessna aircraft's registration No of N700 BC would have revealed that the Cessna aircraft belonged to Sprint Air Inc, until today. Furthermore, the appellant had already stated in its statement of claim filed in October 2005, that it intended to purchase a Cessna aircraft bearing that registration number. And, in fact, it was upon the recommendation of the respondent that that Cessna aircraft was covered by way of an endorsement in the appellant's insurance policy on its Beach Baron aircraft, issued earlier. The respondent surely cannot now come to court with a simple affirmation in an affidavit to say that it could not find this evidence with reasonable diligence since 2004. Thus, in our view, the factual disputes are obvious and can only be resolved in a trial, with examination of witnesses for the court to make definite findings of facts rather than from merely relying on the affidavits supporting encl 29 alone and come to a determination that the appellant was guilty of committing fraud on the court by concealing a material fact. It is for this reason that the law requires for a party seeking to impeach a judgment based on fraud to file a fresh action. Only then can there be a proper finding on whether the appellant had committed a deliberate fraud on the court.

[40] Faced with these credible counter allegations as found in the appellant's opposing affidavit, and in the absence of a viva voce enquiry on those disputed facts, the courts below should have ignored those disputed deposition of facts forming the basis of the alleged fraud. The courts in such a situation should only confine themselves and decide the outcome of the case by considering only the incontrovertible facts. In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, a case involving a petition for the winding up of a company, with both sides presenting contradicting affidavits, the Privy Council in their advice stated that:

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[41] The appellant further submitted that there is no known procedures in the RHC 1980 to allow encl 29 (a summons in chambers application) to be entertained. Learned counsel cited the following rules which he said were inapplicable:

(a) Order 56 r 3A of the Rules of the High Court 1980 covers the introduction of fresh evidence in appeals from registrar to judges. In this case the encl 29 was firstly, not in the course of any appeal and secondly, there was in existence a valid sealed judgment against which all levels of

appeal had been exhausted. Order 56 r 3A does not allow the court to hear an application to hear allegedly fresh evidence when there is no matter before the court;

(b) Order 18 r 19(1)(a) or (d) of the Rules of the High Court 1980 is for interlocutory applications which only allows an application to strike out a pleading prior to judgment, not subsequent to judgment; and

(c) Order 42 r 13 of the RHC 1980 refers to setting aside a judgment — a procedure already exercised by the respondent in 2006 vide encl 6 to set aside the default judgment which was even heard on appeal by the Court of Appeal and Federal Court. A similar second application cannot be filed — (*Tenaga Nasional*).

[42] We agree with above assertions of the appellant. In our view, the very filing of encl 29 is inherently defective and unknown under our RHC, and should have been summarily dismissed by the High Court. We also make this observation on the application of the court's summary power to strike out a pleading under O 18 r 19 of the Rules of Court 2012 (successor to RHC 1980). Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case' can a pleading be struck out. In exercising it, and especially under r 19(1)(a), the court must have regard to the 'quality of an all the circumstances surrounding the plea (see *Lembaga Kumpulan Wang Simpanan Pekerja v Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 MLJ 65; [2000] 2 AMR 2119 (FC)). The court should also bear in mind that the effect of striking out a pleading is to completely deprive a plaintiff from having his day in court.

[43] We are also of the view that, having considered the antecedents to encl 29, that application for the admission of fresh evidence was misguided. If the affidavits of both parties had been carefully considered it would have been clear that the so-called fresh evidence was not new and readily available with a little earnest effort by the respondent. We make a passing observation on this issue only because it arose from encl 29 and became the basis for the respondent's contention on lack of standing and fraud of the appellant.

[44] We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is functus officio. The matter as decided vide encl 6 is thus res judicata and cannot be re-litigated. It needs to be emphasised that the order made under encl 6 was appealed and affirmed right up to the Federal Court. It cannot now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the

respondent to have a second bite of the cherry and in the manner as it did. This passage from *Tenaga Berhad* explains the rationale:

> There was no merit in the appellant's argument that the second application to set aside the default judgment was justified because it was based upon a different ground from that relied upon in the first application. The doctrine of res judicata in its wider sense was applicable in the present case. It was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would amount to presenting one's case in installment which the law does not permit.

In our judgment too, the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of res judicata. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine, a position taken by the common law courts ever since *Henderson* (1843).

DUTY OF INSURANCE BROKERS

[45] The respondent is an insurance broker, not an insurer. By definition, it means that it is 'a person who, as an independent contractor, carries on insurance broking business and includes a reinsurance broker' (s 2 of the Insurance Act 1996). Its business thus pertains to that of 'soliciting, negotiating or procuring a policy with an insurer or the renewal or continuance of the policy, for the policy owner other than himself (s 2 of the Insurance Act 1996). A broker does not issue an insurance policy. That is the business of a licensed insurer.

[46] In this case, it is not in dispute that the respondent is a broker, and not a licensed insurer. It cannot thus be liable for any damages the appellant had with the latter under an insurance policy. However, the claim for damages by the appellant, pursuant to its writ was under tort, for which the respondent owed a duty of care to it. It was submitted by the appellant and we agree, that the respondent as a professional broker whose expertise was relied upon, was liable to it for professional negligence in not arranging a proper insurance coverage for the Cessna aircraft resulting in the insurer disclaiming liability and refusing to indemnify the appellant's loss. The answer to question 4 posed to us is thus in the positive.

THE INSURABLE INTEREST

[47] Question 5 pertains to the issue of insurable interest, which the Court

of Appeal found that the appellant had none since it was not the legal owner of the Cessna aircraft. Thus, the appellant could not possibly succeed in its claim for damages. We think that this question need not be answered since the claim by the appellant against the respondent is under tort, based on the latter's negligence, for its failure to exercise reasonable skill and care as a licensed insurance broker. It is not a claim under the insurance policy for which we agree that the prerequisite of an insurable interest needs to be shown by a claimant. However, we wish to clarify that to determine whether the appellant had any insurable interest is not dependent on it being the legal owner of the aircraft alone. Insurable interest can be established either by ownership, possession or direct relationship to the subject matter of the insurance. Thus, one has an insurable interest if by taking out an insurance policy one gains a benefit from the preservation of that subject matter or suffers a disadvantage should it be lost. In *Standard Chartered Bank v KTS Sdn Bhd* [2006] 4 MLJ 617; [2006] 4 CLJ 79, the Federal Court held that 'to constitute an insurable interest the person insuring the property must have a legal or equitable interest in the property insured'. The interest in the insured property is thus not confined to just a legal interest per se. To substantiate this proposition we refer to this paragraph on the categories of persons who have insurable interest in general insurance from *Halsbury's Laws of Malaysia* Vol 4 at para 60.034 which says:

> Broadly speaking, the following persons would be considered to have an 'insurable interest' in the subject matter in which they are respectively interested: owners of property; vendors and purchasers; landlords and tenants; bailors and bailees; pledgors and pledges; consignors and consignees; common carriers and other carriers; mortgagors and mortgagees; lienholders; shareholders in their shares; agents in their commission; a trader in his stock in trade and profits; a hirer in the thing hired; an insurer in his risk (right of reinsurance).

[48] For these reasons above, this appeal is allowed with costs, and the orders made by the courts below on encl 29 are set aside. The perfected judgment and order obtained earlier on by the appellant therefore remain valid and enforceable.

Appeal allowed with costs and orders made by courts below on encl 29 set aside.

Reported by Afiq Mohamad Noor